No. 02-1432

IN THE
Supreme Court of the United States

DANIEL HEIMMERMANN AND EMILY HEIMMERMANN, BOTH INDIVIDUALLY AND ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

FIRST UNION MORTGAGE CORPORATION
Respondent.

Supreme Court, U.S.
FILED
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BETH A. RICHARDSON
AND
PAMELA C. HIRSCH, INDIVIDUALLY, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, DAVID L. HIRSCH,
Petitioners,

v.

BANKAMERICA CORPORATION, A DELAWARE CORPORATION, BANK OF AMERICA FSB, INC., A HAWAII CORPORATION, BANKAMERICA MORTGAGE, A DIVISION OF BANKAMERICA FSB, A HAWAII CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Eleventh Circuit has deepened an existing circuit conflict by relying on *Satellite Broadcasting* to hold that HUD's 2001 Policy Statement must be given *Chevron* deference and *Culpepper III* must be overruled. Seven circuits have rejected the Eleventh Circuit's approach and held that *Neal*, *Maislin*, and *Lechmere* preclude an agency from overruling a court of appeals precedent on a question of statutory interpretation. Respondents nowhere address those cases or dispute that the question is of exceptional importance to the role of agencies and courts in administering statutes. Instead, they claim this conflict is not implicated here because RESPA is "ambiguous" and all the *Heimmermann* court did was defer to HUD's informal "clarification" of its 1999 Policy Statement.

Respondents' argument contains a dispositive flaw. In *Culpepper I* and *II*, which were rendered *before* HUD issued any informal policy statement, the Eleventh Circuit unequivocally established that RESPA § 8(a) and (c) are unambiguous, and yield spread premiums that are not in exchange for any service provided to the borrower are illegal referral payments. Respondents have no answer to that point. Indeed, they can muster only a single citation to *Culpepper I* and *II* in a lone footnote devoid of analysis. *See* Opp. 6-7 n.3. Yet *Culpepper I* and *II*, on which *Culpepper III* directly relied to uphold class certification, established Eleventh Circuit law on a question of statutory construction that HUD later attempted to overturn. Thus, the decision below squarely implicates the rule of seven circuits that reject agency attempts to overturn circuit precedent on questions of statutory construction.

1. *Culpepper I* and *II* established the Eleventh Circuit's authoritative construction of RESPA § 8(a) and (c), which the court did not find ambiguous. In *Culpepper I*, the court framed the issue as "whether [the lender's] payment of a yield spread premium to [the broker] for the referral of an above par loan is an illegal fee under RESPA or a

valid payment for goods or services." 132 F.3d at 695. Noting that district courts had disagreed about "whether a yield spread premium violates RESPA," the court explained that it would first "determine whether the yield spread premium here was a referral fee." *Id.* "Tracking [§ 8(a)], RESPA is violated if (1) a payment of a thing of value is (2) made pursuant to an agreement to refer settlement business and (3) a referral actually occurs." *Id.* at 695-96.[1] Because the bank made a payment to the broker through the yield spread premium, and the broker referred the loan under an agreement to that lender (instead of another lender), the "yield spread premium . . . was a referral fee, and thus a violation of RESPA, unless the payment falls within one of the exceptions listed in [§ 8(c)]." *Id.* at 696. The Eleventh Circuit found nothing ambiguous about "payment of a thing of value" or "referred" in § 8(a), or in determining whether, in a context identical to the ones at issue here, a yield spread premium violated § 8(a). "[The bank] violated [§ 8(a)] by paying [the broker] a fee for 'directing,' *i.e.*, referring, the Culpeppers' business to a particular lender." *Id.*

Turning to § 8(c), the *Culpepper I* court determined that "the payment of the yield spread premium was not tied to the quantity or quality of the services that [the broker] provided. Rather, the sole determinant . . . was the interest rate on the loan." *Id.* at 697.[2] As the court concluded,

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[1] That test for determining liability arises directly out of § 8(a)'s plain language. By contrast, HUD's two-part "test" in the 2001 Policy Statement, which assesses the "reasonableness" of a broker's "total compensation," does not rest on any words in § 8. *See* Pet. 26 n.23.

[2] Respondents assert in this Court (Opp. 4 n.1) that the rate sheets cannot legally be disclosed to borrowers. Yet nothing in the regulations cited by respondents supports that assertion. Indeed, BankAmerica below represented that "brokers . . . may freely communicate to borrowers the pricing information contained on the rate sheets." BankAmerica C.A. Br. at 8, No. 99-11554-JJ. There is no small irony in respondents' hiding behind the *Truth* in Lending Act to justify failing to provide borrowers with accurate information that would enable them to obtain a lower interest rate. Indeed, even if mere disclosure could obviate the illegality of the payment, which it cannot, the "disclo-

"the only 'service' for which the yield spread premium was compensation was [the broker's] 'service' of referring an above par loan to [the lender]. However, referring loan business, even valuable business, is not a service for which RESPA permits payment. The yield spread premium payment thus violated RESPA." *Id.*

On rehearing, the court unequivocally confirmed that *Culpepper I* had perceived no ambiguity: "[w]e are *duty-bound to apply RESPA as written* to determine whether, under the facts of this case, [the lender's] payment of a yield spread premium was lawful." *Culpepper II*, 144 F.3d at 719 (emphasis added). Respondents do not contest that there is no meaningful distinction between the facts in *Culpepper* and those here.[3]

Instead, respondents seek to hide behind HUD's attempt to find statutory ambiguity where *Culpepper I, II,* and *III* found none. RESPA § 8(a) and (c) are not ambiguous simply because the term "yield spread premium" is not present. The statute plainly prohibits the giving and accepting of "any . . . thing of value pursuant to any agreement or understanding . . . that business . . . shall be referred," unless the payment is "for goods or facilities actually furnished or for services actually performed." 12 U.S.C. § 2607(a) & (c)(2). Indeed, the Seventh Circuit has held that a rental fee can fall within the prohibition of RESPA § 8(a) – the court there found no ambiguity simply because the words "rental agreement" do not appear in § 8. *See Lawyers Title Ins. Corp. v. Dearborn Title Corp.*,

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sures" made by respondents are, at best, opaque to the average borrower. *See* Pet. App. 91a (line 811: "Premium Pricing to POC (600.00) from B of A to AMM"). In each loan here, the yield spread premium was not in exchange for any services rendered to the prospective class members, thus falling squarely within *Culpepper I*'s rule of liability.

[3] Even if *Culpepper I* were limited to its facts (Opp. 6-7 n.3), respondents' payments of yield spread premiums to the prospective class members' brokers would still be illegal under that decision. But *Culpepper I* was not so limited: the Eleventh Circuit "*read RESPA* to prohibit certain transactions." *Culpepper II*, 144 F.3d at 719 (emphasis added). That legal determination applies beyond those facts.

118 F.3d 1157, 1162 (7th Cir. 1997) (Posner, J.). Before HUD issued its two Policy Statements and thereby made agency deference an issue,[4] therefore, the Eleventh Circuit had plainly construed RESPA § 8(a) and (c), discerned no ambiguity, and framed a broadly applicable test for determining when a yield spread premium is illegal.

2. Given *Culpepper I* and *II*'s construction of RESPA, the conflict identified in the petition is squarely presented. A phalanx of circuits plainly disagrees with the Eleventh Circuit's holdings in *Satellite Broadcasting* and *Heimmermann* that an agency *can* overrule circuit precedent that authoritatively construes statutory language. *See* Pet. 19-24. Those circuits reject the notion that an administrative agency has "the power to overrule by regulation a precedent of an appellate tribunal." *Bankers Trust*, 225 F.3d at 1371; *see also* Pet. 22-23 (discussing cases from D.C., 2d, 4th, 7th, 8th, and 9th Circuits).

Respondents do not contest the existence of that circuit conflict at all. Remarkably, they neither discuss nor cite the cases addressed in the petition as conflicting. Nor do they dispute that it is wholly improper for an agency to overturn a court of appeals' precedent authoritatively construing a statute. Instead, respondents place all their eggs in a single basket – mischaracterizing what the Eleventh Circuit did here as construing a supposedly "ambiguous" statute. *See* Opp. 20-22. That bold response, however, is belied by a simple fact that they also ignore: In *Culpepper I* and *II*, the Eleventh Circuit had already

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[4] Respondents claim that "Congress directed HUD" to issue the 1999 Policy Statement, which "Congress . . . expected . . . to carry weight." Opp. 5, 27. In fact, the direction appeared in a conference report issued only by committee members, which was not a statutory enactment by the full Congress and cannot delegate interpretative authority to an agency. *See* Pet. 8 n.7. In *Rostker v. Goldberg*, 453 U.S. 57, 73-74 (1981), by contrast, both Houses had passed language affirming the conference report relied on by this Court. In any event, no member of Congress requested the 2001 Statement: that was HUD's response to pressure from lenders who wanted HUD to repudiate *Culpepper III*'s upholding class certification in a § 8(a) yield spread premium case.

construed RESPA § 8(a) and (c), found no ambiguity in those provisions with respect to the payment of yield spread premiums on facts *identical* to those here, and held that the payments were illegal. *See Culpepper III*, 253 F.3d at 1330 ("Under § 8(a), a payment whose reason is to compensate for referrals is illegal, period.").[5] Thus, this case does not, as respondents erroneously assert, involve a court of appeals "properly defer[ing] to the intervening agency interpretation." Opp. 21. Rather, it squarely presents the question on which there is a seven-to-one split in the circuits – whether an agency's policy statement that seeks expressly to overrule circuit precedent on a question of statutory interpretation is entitled to *Chevron* deference.[6]

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[5] Judges Kleinfeld and Berzon agree that RESPA § 8(a) and (c) are "unambiguous," "the intent of Congress is clear," and the "express language cannot be interpreted away" through the 2001 Policy Statement. *See Schuetz*, 292 F.3d at 1016-17 (Kleinfeld, J., dissenting); *Bjustrom v. Trust One Mortgage Corp.*, 322 F.3d 1201, 1209 (9th Cir. 2003) (Berzon, J., concurring) ("Judge Kleinfeld[] . . . has it exactly right," but concluding that *Schuetz* was binding circuit precedent).

[6] Respondents mischaracterize *Satellite Broadcasting*. *See* Opp. 19. There, the Eleventh Circuit also believed itself compelled to defer to a new agency interpretation and to overrule a prior decision holding that a satellite broadcaster is "a cable system as defined under [17 U.S.C.] § 111." *NBC, Inc. v. Satellite Broad. Networks, Inc.*, 940 F.2d 1467, 1471 (11th Cir. 1991). The *NBC* court was "unpersuaded that 'located in any State' means located entirely within a single state" because "nothing in the words Congress chose" supported the view "that only local cable companies [are] included" in § 111. *Id.* at 1470. In overruling that decision, the Eleventh Circuit held that, because § 111 does not explicitly refer to satellite broadcasters, its earlier decision was not based "upon the statute's 'clear meaning'" and, therefore, this Court's decisions in *Lechmere* and *Maislin* were inapplicable. *Satellite Broad.*, 17 F.3d at 348. The court also noted that adhering to its prior decision "would wed this circuit to [that] decision, while all other circuits" would defer to the new agency regulation. *Id.* Following *Satellite Broadcasting*, the *Heimmermann* court focused on the absence of the words "yield spread premium" in RESPA § 8(a) and (c) and overruled *Culpepper III* to bring itself into line with circuits that had deferred to HUD's 2001 Policy Statement. *See* Pet. App. 5a. *Heimmermann* and *Satellite Broadcasting* thus squarely conflict with *Bankers Trust*,

Even the court below perceived the 2001 Policy Statement as attempting to overrule *Culpepper*'s construction of RESPA: "That we may have determined in *Culpepper III* that *a different interpretation of RESPA* (in our view) is better or more consistent with the *statutory language* does not require – *or even allow* – us to reject HUD's interpretation." Pet. App. 8a (emphases added). The *Heimmermann* court made no effort to defend the merits of the agency's putative construction of the statute (which tracked the wishes of the lending industry and which the court had already expressly rejected in *Culpepper III*). The court nonetheless felt constrained by circuit precedent to reject *Culpepper*'s prior statutory construction: "We also conclude that the rule announced in the 2001 SOP can, in effect, overrule the holding of *Culpepper III*." *Id.* at 9a (citing *Satellite Broadcasting*).[7] Yet that is precisely what this Court and seven circuits have held an agency cannot do. *See Neal*, 516 U.S. at 295 ("Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law."); Pet. 23-24 (discussing cases). Moreover, an

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where the Federal Circuit refused to defer to a Treasury regulation, when doing so would require it to overrule a prior decision that "was based on direct judicial construction of the statute, not deference to the [agency]," even though it "creat[ed] inconsistency with the outcomes in" other circuits that had deferred. 225 F.3d at 1376.

[7] In *Culpepper III*, the Eleventh Circuit avoided clashing with HUD by interpreting the 1999 Policy Statement to accord with *Culpepper I*'s construction of RESPA. *See* 253 F.3d at 1332. But for *Satellite Broadcasting*, *Culpepper III* could have disregarded HUD's statement and held that it had already construed RESPA. *See id.* at 1328 ("centerpiece" of lender's argument was that 1999 Policy Statement "overrules *Culpepper I*'s interpretation of § 8(c)"). HUD's 2001 Policy Statement made a conflict between the agency and the Eleventh Circuit's precedent impossible to avoid, because HUD openly expressed its disagreement with *Culpepper III*. 66 Fed. Reg. at 53054-55. As Judge Easterbrook put it, the Eleventh Circuit decided to "kowtow" to HUD. *Krzalic*, 314 F.3d at 882 (Easterbrook, J., concurring). Instead of following *Satellite Broadcasting*, the court should have applied *Neal*, *Maislin*, and *Lechmere*. *See* Pet. 12-18.

agency cannot "find" ambiguity where none exists. *See, e.g., Whitman*, 531 U.S. at 481.

Respondents offer no reason why this Court should not resolve the conflict by holding that the *Neal* rule applies to precedents established by the courts of appeals.[8] Indeed, respondents urged the court below to adopt the very position that has deepened the conflict.[9]

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[8] Respondents cite seven cases (Opp. 21) that actually confirm the split on whether an agency can compel a court to abandon a precedent authoritatively construing a statute, with the Sixth Circuit appearing to side with the Eleventh Circuit. *See NLRB v. Webcor Packaging, Inc.*, 118 F.3d 1115, 1122-23 & n.8 (1997) (distinguishing precedent, but stating, in *dicta*, that it would be compelled to overrule precedent that independently construed National Labor Relations Act and "gave no deference to the Board's reading"). The other cases cited by respondents demonstrate that circuits other than the Eleventh adhere to the position that once a court "directly construe[s] a statute" without reference to an agency interpretation – as the Eleventh Circuit did in the *Culpepper* cases – it is "bound to follow [that] decision[]" notwithstanding a later, contrary agency interpretation. *National Org. of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs*, 260 F.3d 1365, 1374 (Fed. Cir. 2001) (citing *Bankers Trust*). In only one case cited by respondents did the court actually overrule a prior decision, and there the court did so only after finding that its earlier decision held simply that the agency's prior interpretation "was an acceptable reading of the Act." *NLRB v. Bufco Corp.*, 899 F.2d 608, 610-11 & n.5 (7th Cir. 1990).

[9] First Union argued: "[A]s a rational interpretation of [RESPA § 8(a)], this Court *is obliged* to adopt the test articulated by HUD in the 1999 and 2001 Policy Statements. *See* [*Satellite Broadcasting*] (according *Chevron* deference to an agency's interpretation of a federal statute even though at odds with circuit precedent)." First Union Supp. C.A. Br. at 7-8, No. 99-14066-JJ (emphasis added; footnote omitted). BankAmerica made a similar argument. Supp. C.A. Br. at 13, No. 99-11554-JJ (arguing that "procedural situation here is nearly identical to the one presented in" *Satellite Broadcasting*, where Copyright Office "issued a formal policy decision criticizing" the Eleventh Circuit's "interpretation of the Copyright Act" and the court "nevertheless accorded [the agency's views] *Chevron* deference"). By contrast, petitioners have consistently argued to the court below that it should not follow *Satellite Broadcasting* because, unlike the notice-and-comment regulation at issue in that case, HUD's 2001 Policy Statement is not entitled to *Chevron* deference: it lacks the force of law and intrudes on the judiciary's role to administer private rights of action. *See* Hirsch C.A. Reh'g Pet. at 12, No. 00-11837.

3. The Seventh Circuit's decision in *Krzalic* conflicts with the decision below. In asserting the absence of a conflict because *Krzalic* construed RESPA § 8(b) and this case concerns § 8(a), Opp. 28-29, respondents miss the important point: the Seventh Circuit previously had construed § 8(b) – just as the Eleventh Circuit had with respect to § 8(a) – and HUD set out in the 2001 Policy Statement to overrule administratively both decisions. *See* Pet. 25. While the Eleventh Circuit thought it was compelled to abandon its own interpretation, the Seventh Circuit was under no such misapprehension about HUD's authority. Instead, that court adhered to its precedent after finding that HUD had not shown that the court's construction of RESPA § 8(b), in "the context of . . . the commercial . . . activity that the statute is regulating, points to an unreasonable result." *Krzalic*, 314 F.3d at 880.[10]

4. The 2001 Policy Statement is not entitled to *Chevron* deference.[11] HUD encroached on two matters reserved for

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[10] If anything, RESPA § 8(a) is less ambiguous than § 8(b), because (a) prohibits "*any . . . thing of value*" whereas (b) prohibits "any portion, split, or percentage of any charge." This Court has frequently noted the breadth of criminal provisions – and violations of § 8 carry criminal and civil penalties – addressing "anything of value." *See United States v. Sun-Diamond Growers of Calif.*, 526 U.S. 398, 401, 408-09 (1999).

[11] Without quoting the Question Presented, respondents assert that deference is not at issue here. *See* Opp. 22. But we clearly challenge whether the court below erred "in according *Chevron* deference to an informal" policy statement. Pet. i. Neither *Glover* nor *Schuetz* raised the precise issue here, because the Eighth and Ninth Circuits had not construed RESPA prior to HUD's informal policy statements, as the Eleventh Circuit did in *Culpepper I* and *II*. Moreover, respondents' reliance (Opp. 28) on *Auer v. Robbins*, 519 U.S. 452 (1997), is misplaced. There, the Court deferred to an agency's interpretation of its regulations, based on the specificity of Congress's delegation and the principle that deference is due an agency's construction of its own ambiguous regulations. *Id.* at 461-63. Here, that principle does not apply because HUD's regulations (24 C.F.R. § 3500.14 (Pet. App. 66a-70a)) simply mirror the statutory language of § 8 (Pet. App. 48a-51a). *See Cunningham v. Scibana*, 259 F.3d 303, 307 n.1 (4th Cir. 2001) (no deference to agency's informal interpretation of regulation that repeats statutory language), *cert. denied*, 534 U.S. 1167 (2002).

the judiciary – to decide the scope of liability in a private right of action and to determine whether a class can pursue that right. First, HUD purports to exonerate a lender whenever the entire payment received by a broker is "reasonable," notwithstanding that part of that compensation was a referral fee paid pursuant to an agreement with the broker. *See* 66 Fed. Reg. at 53055; Pet. 16. But § 8 says nothing about the "reasonableness" of a plainly illegal "referral fee." It is not the agency's role to contort the words of a statute to relieve a private party from civil liability. *See Adams Fruit*, 494 U.S. at 649 (judiciary is "adjudicator of private rights of action arising under the statute"); *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., joined by O'Connor & Kennedy, JJ., concurring in the judgment) (no *Chevron* deference to agency interpretations of provisions "not administered by any agency but by the courts"). Indeed, Judge Easterbrook, concurring in *Krzalic*, noted the Eleventh Circuit's failure to "discuss[] the significance of *Adams Fruit*" and expressed "confiden[ce] that *Heimmermann* . . . erred in thinking that the [2001 Policy Statement] is itself conclusive under *Chevron*." 314 F.3d at 882-83.

Second, HUD purports to tell courts *how to examine the relevant evidence of liability* in private civil actions, thereby interfering with the courts' duty to determine whether a class of plaintiffs meets the Federal Rule of Civil Procedure 23(b)(3) standard that "questions of law or fact common to . . . the class predominate." *See* 66 Fed. Reg. at 53054 (legality of yield spread premium "can only be evaluated in the context of the test HUD established" on loan-by-loan basis). But this Court has stressed that an agency's claim "that Congress contemplated a case-by-case adjudication of claims . . . that is incompatible with class relief" is inconsistent with the court's duty to apply Rule 23 to "'all suits of a civil nature.'" *Califano*, 442 U.S.

at 698-99, 700; *see* 12 U.S.C. § 2605(f)(2) (class action provisions under RESPA).[12]

Third, the 2001 Policy Statement lacks the formality to warrant *Chevron* deference. *See* Pet. 17-18. Nothing in RESPA § 19(a) delegates authority to HUD to issue informal policy statements with respect to the private right of action in § 8(d). HUD's general authority to issue "interpretations" does not empower the agency to pretermit a court's consideration of whether evidence of a standard agreement supports certifying a class to challenge yield spread premiums paid without any link to services rendered.[13] *See also Krzalic*, 314 F.3d at 882 (Easterbook, J., concurring) ("[I]n private litigation *Chevron* does not give any force to a declaration unaccompanied by the formalities of rulemaking or administrative adjudication.").

CONCLUSION

The petition for a writ of certiorari should be granted.

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[12] Respondents' suggestion that it "remains the exclusive province of the courts" to apply the Rule 23(b)(3) standard (Opp. 24) is contradicted by its recognition that deference to HUD's 2001 Policy Statement necessarily precludes class treatment (Opp. 12).

[13] Respondents invoke § 19(a) and (b) without responding to our explanation that those provisions do not apply here. *See* Pet. 18 n.13 & 14. The more specific provision of § 8(c)(5) requires *regulations* if HUD wishes to exempt certain payments from § 8(a), and the 2001 Policy Statement is not a regulation. *See* Pet. 18 n.14. Interpretations under § 19(a) do not warrant *Chevron* deference because they are "not binding." *Graham Mortgage*, 740 F.2d at 421-22. *See* Pet. 18. A "nonbinding rule" "do[es] not have the force and effect of law," Thomas W. Merrill & Kathryn T. Watts, *Agency Rules with the Force of Law*, 116 Harv. L. Rev. 467, 477 (2002), which is a prerequisite for deference, *see* Pet. 17-18. Nor does the 2001 Policy Statement have the force of law under the factors identified in *Barnhart v. Walton*, 122 S. Ct. 1265 (2002): the legal question is not "interstitial," whether the fee must be in exchange for services is not complex, and the 2001 Policy Statement was not the result of consideration "over a long period of time," but instead was a hasty effort to overrule *Culpepper III*. *Id.* at 1272. Finally, RESPA's safe harbor does not apply (Opp. 27) because the yield spread premiums here were paid *before* HUD issued its 2001 Policy Statement. *See* Pet. 18 n.13.

Respectfully submitted,

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